THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 07.08.2008

+ ITA 1150/2007

THE COMMISSIONER OF INCOME TAX-XVI ... Appellant

- versus –

SHRI S. DHANABAL ... Respondent

Advocates who appeared in this case:
For the Appellant : Ms Rashmi Chopra
For the Respondent : Mr Ajay Vohra with Ms Kavita Jha and Mr Sriram Krishna

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in Digest ? Yes

BADAR DURREZ AHMED, J (ORAL)

1. This appeal, filed on behalf of the revenue, pertains to the assessment year 2001-02. It is directed against the order passed by the Income-tax Appellate Tribunal on 09.02.2007.

2. For the assessment year under consideration, the assessee filed a return declaring an income of Rs 41,30,950/- and claimed 100% deduction under Section 80 HHE of the Income-tax Act, 1961 (hereinafter referred to as 'the said Act') in respect of the profits from

rendering software services. It is an admitted position that for this assessment year, i.e., 2001-02, the assessee could have claimed only 80% deduction. The entire issue is with regard to the claim of the assessee for 100% deduction and as to whether the assessee in doing so made itself liable for penalty under Section 271(1)(c) of the said Act.

3. In the course of the assessment under Section 143(3), the Assessing Officer pointed out to the assessee that his claim of 100% deduction under Section 80 HHE was not permissible and he would be entitled only to an 80% deduction. The assessee, on realising the mistake, accepted the same. The assessment was completed accordingly and the income was assessed at Rs 63,03,463/- after allowing a deduction at 80% as against the claimed deduction of 100% under Section 80 HHE. Penalty proceedings were initiated separately.

4. In the penalty proceedings under Section 271(1)(c) of the said Act, the assessee gave the explanation that the assessee being a software professional was not well-versed with the intricacies of the Income-tax Act and that he relied upon the advice given by the Chartered Accountant who had issued a certificate indicating that 100% deduction could be granted under Section 80 HHE. It was also pointed out by the assessee that in subsequent years, the assessee had revised

his returns immediately on its being pointed out that the claim of deduction at 100% was not correct.

5. The Assessing Officer, however, did not accept the explanation offered by the assessee and came to the conclusion that the assessee had an intention to furnish inaccurate particulars and, therefore, levied a penalty of Rs 7,12,526/-.

6. The assessee took the matter in appeal before the Commissioner of Income-tax (Appeals), who, after a detailed consideration of the explanation offered by the assessee and the circumstances under which the assessee had made the claim of 100% deduction, came to the conclusion that the excess deduction had been inadvertently claimed by the assessee due to the mistake of the assessee's consultant and ignorance of the law in force. The Commissioner of Income-tax (Appeals) returned a definite finding that it is not a question of excess deduction having been claimed *mala 'fidely'*, on the other hand, it is a case where the appellant has shown reasonable cause to have made such a claim. It was also found that the assessee relied upon the expert's advice which ultimately turned out to be wrong. In these circumstances, the assessee could be said to have had a reasonable cause for committing the said mistake. Consequently, the

7. Being aggrieved by this decision, the revenue filed an appeal before the Income-tax Appellate Tribunal which culminated in the impugned order. The tribunal noted that it is not in dispute that the assessee was entitled to claim deduction under Section 80 HHE of the said Act and that the only dispute is with regard to the quantum of deduction to be allowed. It is relevant to note that upto the assessment year 2000-01, the assessee would have been entitled to 100% deduction and it is only with effect from the assessment year 2001-02 that the quantum was reduced to 80%. The tribunal also noted that the claim of the assessee had been duly certified by the Chartered Accountant and, therefore, the plea of the assessee that the claim was made under a *bona fide* mistake deserved to be accepted. Importantly, the tribunal also noted that "all primary facts were before the AO" and that the deduction was to be allowed on the percentage applicable under Section 80 HHE. The tribunal returned a specific finding that the assessee cannot be said to have furnished inaccurate particulars and concluded that the CIT (Appeals) had rightly cancelled the penalty. The revenue's appeal was consequently dismissed.

8. We see no reason to interfere with the tribunal's decision. As observed in ***Dilip N. Shroff v. Joint Commissioner of Income-tax and***

271(1)(c), the Assessing Officer, in view of the provisions of clause (B) of Explanation 1, must return a finding that the assessee failed to prove that the explanation offered by him is not only not *bona fide*, but all the facts relating to the same and material to the income were not disclosed by him. The Supreme Court observed that apart from the assessee's explanation being not *bona fide*, the Assessing Officer should also return a finding of fact that the assessee had not disclosed all the facts which were material to the computation of his income.

9. From the aforesaid decision of the Supreme Court, it is clear that *de hors* the question of *mens rea* and the question of the effect the deletion of the word "deliberate" from the provisions of Section 271(1)(c) would have on the issue of *mens rea*, as per the terms of the said explanation 1(B) before penalty can be imposed upon an assessee, it has to be found as a question of fact that the explanation offered by the assessee is not only not *bona fide*, but it must also be found as a fact that the assessee has not disclosed all the facts which were material to the computation of his income. If either of these two ingredients are missing, then penalty cannot be imposed upon the assessee. In the present case, we find that the assessee had clearly indicated all the facts from which his income could be easily computed. The only question that remained to be ascertained was the quantum of deduction that the

deduction under Section 80 HHE, when he was actually entitled to only an 80% deduction. This, also, he did on the basis of expert advice which had been certified by his Chartered Accountant. The Commissioner of Income-tax (Appeals) as well as the tribunal have come to a conclusive finding that the explanation offered by the assessee was *bona fide* and that all facts which were material to the computation of his income had been disclosed by the assessee. That being the case, there is no question of any penalty being imposable on the assessee. Consequently, no interference with the tribunal's order is called for.

10. No substantial question of law arises for our consideration. The appeal is dismissed.

BADAR DURREZ AHMED, J

RAJIV SHAKDHER, J

August 07, 2008
dutt